

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JAMES M. MILLIKEN,  
Plaintiff,  
v.  
L. KIRBY,  
Defendant.

Case No. [18-cv-03210-JSC](#)

**ORDER OF SERVICE**

**INTRODUCTION**

Plaintiff, a California prisoner, filed this pro se civil rights complaint under 42 U.S.C. § 1983 against an official at Pelican Bay State Prison, where Plaintiff was formerly incarcerated.<sup>1</sup> Plaintiff's application to proceed *in forma pauperis* is granted in a separate order. For the reasons explained below, the complaint is ordered served upon Defendant.

**STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the

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<sup>1</sup> Plaintiff consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (ECF No. 1 at 8.)

statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted). Although to state a claim a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim for relief that is plausible on its face.” *Id.* at 1974.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### LEGAL CLAIMS

Plaintiff alleges that Defendant found him guilty of possession of a razor blade at a disciplinary hearing. His punishment included 120 days of solitary confinement, the loss of good time credits, and the loss of other privileges. The state court held an evidentiary hearing on Plaintiff’s petition for a writ of habeas corpus, found that Plaintiff’s due process rights were violated because his witnesses were not allowed to testify at the hearing and his questions for the witnesses who did testify were deemed irrelevant, and ordered the disciplinary finding expunged from Plaintiff’s record. Plaintiff seeks damages for the 120 days he spent in solitary confinement based upon a disciplinary finding obtained without the procedural protections required by the constitutional right to due process. When liberally construed, plaintiff’s allegations state a cognizable claim for relief under Section 1983.

### CONCLUSION

1. The Clerk shall issue a summons and Magistrate Judge jurisdiction consent form and the United States Marshal shall serve, without prepayment of fees, the summons, Magistrate Judge jurisdiction consent form, a copy of the complaint with attachments, and a copy of this order on **Lieutenant L. Kirby at Pelican Bay State Prison.**

1 The Clerk shall also mail a courtesy copy of the Magistrate Judge jurisdiction consent  
2 form, the complaint with all attachments and a copy of this order to the California Attorney  
3 General's Office.

4 2. Defendants shall complete and file the Magistrate Judge jurisdiction consent form  
5 within the deadline provided on the form. He shall also file an answer in accordance with the  
6 Federal Rules of Civil Procedure.

7 3. To expedite the resolution of this case:

8 a. No later than **91** days from the date this order is issued, Defendants shall file a  
9 motion for summary judgment or other dispositive motion. The motion shall be supported by  
10 adequate factual documentation and shall conform in all respects to Federal Rule of Civil  
11 Procedure 56, and shall include as exhibits all records and incident reports stemming from the  
12 events at issue. If Defendants is of the opinion that this case cannot be resolved by summary  
13 judgment, they shall so inform the Court prior to the date the summary judgment motion is due.  
14 All papers filed with the Court shall be promptly served on Plaintiff.

15 b. At the time the dispositive motion is served, Defendants shall also serve, on a  
16 separate paper, the appropriate notice required by *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th  
17 Cir. 1998) (en banc). *See Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012).

18 c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the  
19 Court and served upon Defendants no later than **28 days** from the date the motion is filed.  
20 Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to him  
21 pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc).

22 d. Defendants shall file a reply brief no later than **14** days after the opposition is  
23 filed.

24 e. The motion shall be deemed submitted as of the date the reply brief is due. No  
25 hearing will be held on the motion unless the Court so orders at a later date.

26 5. All communications by Plaintiff with the Court must be served on Defendants or  
27 their counsel once counsel has been designated, by mailing a true copy of the document to  
28 Defendants or their counsel.

7. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address." He also must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). Reasonable requests for an extension of a deadline will be allowed upon a showing of good cause if the request is filed prior to the deadline.

Dated: July 23, 2018

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**NOTICE -- WARNING (SUMMARY JUDGMENT)**

If Defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact-- that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in Defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

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**CERTIFICATE OF SERVICE**

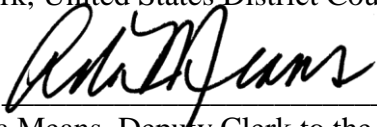
I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 23, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

James M. Milliken ID: F08618  
Corcoran State Prison  
P.O. Box 3476  
4A2R-50  
Corcoran, CA 93212

Dated: July 23, 2018

Susan Y. Soong  
Clerk, United States District Court

By:   
Ada Means, Deputy Clerk to the  
Honorable JACQUELINE SCOTT CORLEY